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30 November 1976

OGC Has Reviewed

MEMORANDUM FOR: Deputy Director of Central Intelligence

FROM : Anthony A. Lapham
General Counsel

SUBJECT : Legal Defense Fund

REFERENCE : (a) Memorandum from DDA, same subject, 17 Nov. 1976

1. Reference (a) summarized results of a meeting held on 12 November to consider the establishment and administration of a legal defense fund. In brief, the idea would be to solicit contributions from current or former Agency employees, and hopefully from other sources as well, and use the resulting proceeds to defray legal expenses [redacted] matter. It is unresolved whether the fund would be for the benefit only of those current and former employees, if any, who may be indicted or whether it also would be open to those who are not indicted or even threatened with indictment but nevertheless incur legal expenses in connection with their appearances as grand jury witnesses. The fund would be controlled by an outside entity, possibly an association of retired Agency employees, which would receive the contributions and decide to whom and in what amounts the proceeds should be disbursed. Arrangements would be made to effectively insulate the ultimate beneficiaries of the fund from knowledge as to the identities of the individual contributors.

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2. As indicated in reference (a), there are two legal questions that must be confronted at the threshold, namely (a) is there any general prohibition that would rule out participation of current Agency employees in the fund, either as contributors or as beneficiaries, and (b) may Agency personnel and facilities be used in aid of the solicitation and administration of the fund. These are the questions with which this memorandum deals, and it should be noted that they relate only to the conduct of current Agency employees. Since all the arguably relevant restrictions in this area are in the nature of conditions

on federal employment, there are quite simply no legal restraints applicable to the conduct of former Agency employees. That is, former employees are legally free to contribute and receive funds among themselves and to solicit funds for their own benefit from current Agency employees. Therefore, in the context of the issues considered in this memorandum, former Agency employees are indistinguishable from members of the general public.

Current Agency Employees as Contributors or Beneficiaries

3. So far as concerns transactions between active government employees, the giving and receiving of gifts is a closely regulated activity. The basic statute in the field is 5 U.S.C. §7351, which provides in full:

An employee may not--

- (1) solicit a contribution from another employee for a gift to an official superior;
- (2) make a donation as a gift to an official superior; or
- (3) accept a gift from an employee receiving less pay than himself.

An employee who violates this section shall be removed from the service.

STATINTL These prohibitions are restated in the Federal Personnel Manual and are carried over, in essentially the same terms, into Agency regulations. ^{1/}
[redacted] The plain meaning of these prohibitions is that gifts from subordinates to superiors (in grade or pay) are barred, and current employees cannot lawfully be involved as a principal, or a solicitor, on either side of such a transaction. However, the door is not shut on gifts that go from superiors to subordinates, or exchanges between employees of equal rank and pay.

^{1/} Civil Service Commission regulations recognize a limited exception to this broad statutory prohibition, as follows:

This section does not, however, prohibit a voluntary gift of nominal value or a donation in a nominal amount when made on a special occasion such as marriage, illness, or retirement. FPM Chapt. 735, Subchapt. 2-2(b).

However, when a member of my staff called the Commission to explore in more detail other possible exceptions, he was advised that the Commission's legal staff is currently having some misgivings about this exception provision and believes it probably would be invalidated if challenged.

4. The underlying purpose of the statutory prohibitions is readily apparent. The obvious policy objective is to assure that merit is the exclusive criterion for personnel decisions and advancement within the federal service, and to foreclose any implication that favored treatment or other employment advantages can be bought or sold, with all the coercive and corruptive effects that would attend such an implication if it were allowed to exist.

5. There is no doubt that a contribution to a legal defense fund would be a gift, and that current Agency employees to whom the benefits of such a fund might be disbursed, even indirectly to their attorneys, would be in a position of accepting a gift. The question then becomes whether such transactions, at least to the extent that the contributors are lower-ranking than the beneficiaries, are proscribed by the statute and corresponding regulation, or whether on the other hand there are circumstances that render the proscriptions inapplicable. The circumstances of potential relevance in this regard are that, under the proposal envisioned by reference (a), the contributions would go to a fund established not for the exclusive benefit of current Agency employees but rather for the benefit of a larger class of persons, including former Agency as well as current Agency employees, the gifts would lose their individual identities when pooled with the fund's other receipts, and the Agency employee beneficiaries would be deprived of any information about who may or may not have contributed to the fund.

6. In my judgment the spirit of the prohibitions would not be violated, and the important policies they serve would not be impaired, by the proposed arrangements. However, to the extent that current Agency employees may share in the distribution of a fund to which lower-ranking Agency employees may contribute, we could still be chargeable with a violation of the letter of the prohibitions, which are absolute in their terms, and I am not confident that we could conclusively refute such an allegation. Accordingly I think the preferred course, if the fund idea is approved, would be to insist on accounting and management procedures whereby the receipts would be segregated by source and distribution to current Agency employees would be made only from that portion of the fund attributable to non-Agency contributors.

7. A further complication would arise if any of the contributions to the fund were made by persons with whom the Agency has contractual or other similar relationships. In that event there would come into play the provisions of Executive Order 11222, and [redacted] which in general preclude the solicitation or acceptance of gifts by current Agency employees from those

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whose commercial interests might be affected by Agency action, again with the evident purpose of forestalling any chance of favoritism or undue influence.²⁷ Here again in my view, while no violence would be done to the spirit of the law by the proposed arrangements, it would be wise to insist on a screening of contributions and procedures that would exclude contributions to current employees of funds derived from any sources having business relationships with the Agency.

Use of Agency Personnel or Facilities

8. The difficulty in the way of using Agency personnel or Agency facilities to aid in the solicitation or in the administration of the proposed fund is that, with certain exceptions and absent safeguards discussed below, such use would constitute an Agency expenditure for which there is no legal authority. If, for example, an Agency employee devoted part of a regular eight-hour work day to fund matters, the time spent would absorb a fraction of the employee's salary and therefore would be equivalent to an Agency expenditure. Likewise the use of Agency paper, etc., would consume sums appropriated to the Agency.

2/ Section 201(a) of Executive Order 11222 provides as follows:

Except in accordance with regulations issued pursuant to subsection (b) of this section, no employee shall solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from any person, corporation, or group which --

- (1) has, or is seeking to obtain, contractual or other business or financial relationships with his agency;
- (2) conducts operations or activities which are regulated by his agency; or
- (3) has interests which may be substantially affected by the performance or nonperformance of his official duty.

[redacted] is the Agency counterpart of these provisions.

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10. The main difficulty in this regard disappears in my view if the arrangements produce no out-of-pocket loss to the Agency. That is, it would be legally unobjectionable if Agency personnel devoted off-duty hours of work

3/ As a general proposition, all government spending is limited to official purposes. While the Comptroller General has recognized a "charitable" exception to this limitation, and while Executive Order 10927 confirms and to some degree broadens this exception, these authorities do not extend to the use of appropriated funds to support a legal defense fund. In Opinion B-119740, the Comptroller General stated:

The utilization of the services of Federal employees during official working hours for the collection of funds for various charity drives...has been recognized as a proper exercise of administrative discretion with respect to the performance of duty of employees, and practice has not been questioned where employees were not hired specifically for and did not devote substantial periods of time to such purposes.

Executive Order 10927 recognizes that the head of an agency may approve policies and procedures regulating "...solicitations conducted by organizations composed of civilian employees or members of the armed forces among their own members for organizational support or for benefit or welfare funds for their members."

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to fund matters, or if any on-duty hours spent were made up by extra uncompensated hours of regular work. Similarly, I doubt there could be objection to the use of Agency consumables such as paper, etc., if the expenses were taken care of by the fund.

11. A final problem has to do with non-consumptive uses of Agency facilities, as for example placing notices on Agency bulletin boards or receptacles in Agency hallways, etc. ^{5/} On this front the principal terrain feature is a GSA regulation, 41 CFR 101-20.307, which appears in the subpart of the Federal Property Management Regulations dealing with conduct on federal property and which provides:

Soliciting alms and contributions, commercial soliciting and vending of all kinds, displaying or distributing commercial advertising, or collecting private debts in or on GSA-controlled property is prohibited. This rule does not apply to (a) national or local drives for funds for welfare, health, or other purposes as authorized by the "Manual on Fund Raising Within the Federal Service" issued by the Civil Service Commission under Executive Order 10927 of March 18, 1961, and sponsored or approved by the occupany agencies; (b) concessions or personal notices posted by employees on authorized bulletin boards; and (c) solicitation of labor organization membership, or dues authorized by occupant agencies under Executive Order 11491 of October 29, 1969, as amended.

A legal defense fund drive is not one of the campaigns authorized by the "Manual on Fund Raising Within the Federal Service" and is not within the other exceptions to the regulatory ban on soliciting contributions in federal buildings, including Agency buildings, within the charge of GSA. Consequently, there could be no actual solicitation of Agency employees in Agency buildings, and that means among other things that there could be no distribution or posting of promotional notices asking for contributions. But in my opinion it would

^{5/} Section 204 of Executive Order 11222 provides:

An employee shall not use Federal property of any kind for other than officially approved activities. He must protect and conserve all Federal property, including equipment and supplies, entrusted or issued to him.

As I read this provision, it is concerned with the waste of public assets for non-governmental purposes, not with non-consumptive uses of federal facilities.

be legally permissible to post notices that simply announced the existence of the fund and advised any interested employees how to get in touch with the sponsoring entity. Any such notice should probably bear the legend "this is not a solicitation."

Summary

12. Current Agency employees may participate in the proposed fund as contributors or beneficiaries, but it would be the safest approach from a legal standpoint if steps were taken to assure that Agency employee contributions go to non-Agency beneficiaries and sums distributed to Agency employees are derived from non-Agency sources. There may be no fund-supporting use of Agency personnel or facilities that amounts to an Agency expenditure. Agency employees may not be solicited for contributions in Agency buildings but may be informed of the fund's existence and sponsors.

13. Judging from a report that appeared in Sunday's Washington Star, copy attached, the FBI seems to have reached some different conclusions about the legal aspects of a defense fund. We will have some discreet conversations with some of the Bureau people involved and see whether they know STATINTL something we don't.

Anthony A. Lapham

Attachment

cc: DDA
DDO
IG
Asst. to DCI
DD/Pers

The FBI Defense Fund: Little Cash; Many Bills

By Jerry Oppenheimer
Washington Star Staff Writer

The tarnished image of the FBI and low morale within the bureau appears to have made it difficult for a private group to raise legal defense funds for some three dozen present and former agents under investigation by the Justice Department.

Only \$25,000 has been raised in the four-month-old fund-raising effort by the Society of Former Special Agents of the FBI, Inc., even though the 6,600-member organization received extraordinary permission from FBI Director Clarence M. Kelley to solicit contributions in the bureau's 59 field offices.

According to officials of the society's Special Agents Legal Defense Fund, established in July, only about 1,000 contributions have been made by current FBI agents, who number more than 8,000, members of the society and friends of the bureau.

THE SOCIETY HAS pledged an additional \$10,000 to the fund to help defray the legal expenses facing present and former agents under investigation for having allegedly participated in break-ins and burglaries against radical organizations during the past five years. The investigation, being conducted by the Civil Rights Division of the Justice Department, is nearly completed.

But the funds raised are exceeded twofold by attorney's bills that have started coming in within the past two weeks, and the bills are expected to mount substantially if any of the agents are indicted and go to trial, according to officials of the fund.

While the officials view the drive as successful and feel certain more contributions will be forthcoming, other sources close to the fund-raising effort expressed concern and dismay that so little money has been raised.

THESE SOURCES, who asked not to be identified, felt that recent congressional, press and courtroom disclosures about FBI activities have had a negative impact on the fund-raising effort and that, as a result, many agents being solicited for donations feel no compassion to contribute.

Some agents interviewed this week by telephone said they declined to contribute because they felt the Justice Department should defend those under investigation, or at the least break-ins and burglaries occurred in the line of duty and under orders from superiors.

Other agents interviewed said they refused to make donations because they felt there was a strong possibility that those under investigation did participate in alleged crimes, and they felt it would be a conflict in their role as law enforcement officers to help them financially.

OTHERS SAID THEY wanted to put an end to the "you-have-to-chip-in syndrome" that has permeated the bureau for years. Still others expressed indignation that Kelley would allow such a solicitation when other charities and organizations have long been blocked from seeking funds within the bureau.

Washington attorney Charles Noone, a former FBI agent, member of the society and one of the three officials overseeing the drive, said the fund-raising effort has been "relatively low-key," with no direct solicitation within the field offices.

He said that fund-raising announcements have appeared in the society's magazine, *The Grapevine*, and letters asking for donations have been sent to the special agents in charge of the field offices. Solicitations have also been made of police graduates of the FBI's National Academy training center at Quantico.

BUT ACCORDING TO Noone the largest contribution from any individual has been about \$100, with most of the donations ranging from \$10 to \$25. He said the defense fund has not attempted to determine the percentage of response from active FBI agents.

Besides the donations, Noone noted, some of the lawyers representing clients in the Justice Department investigation have offered their services on a reduced-fee basis. There are about 10 lawyers, at least two of them members of the society, who are defending the present and former agents.

Buffalo, N.Y., attorney Ralph J. Gregg, another official of the fund, reasoned that contributions "are a little bit slow in coming in" because the legal defense fund drive was competing during the summer with a society effort to raise money for a J. Edgar Hoover memorial monument to be erected here at a cost in excess of \$200,000.

HE SAID THE memorial is to be "an expression of appreciation by the society members for what the FBI did for them in their careers. We loved J. Edgar Hoover. He was a wonderful man and the finest public servant of his generation."

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